United States Court of Appeals

for the Second Circuit

APPELLANT'S REPLY BRIEF

76-6076

To be argued by
MARVIN SCHWARTZ

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P/S

United States Court of Appeals

FOR THE SECOND CIRCUIT

W.J. USERY, Secretary of Labor,
UNITED STATES DEPARTMENT OF LABOR,

Plaintiff-Appellee,

—against—

INTERNATIONAL ORGANIZATION OF MASTERS, MATES AND PILOTS, INTERNATIONAL MARITIME DIVISION, ILA, AFL-CIO,

Defendant-Appellant.

DEFENDANT-APPELLANT'S REPLY BRIEF

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MATES AND PILOTS, INTERNATIONAL MARITIME
DIVISION, ILA, AFL-CIO,

x

Defendant-Appellant.

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DEFENDANT-APPELLANT'S REPLY BRIEF

PRELIMINARY STATEMENT

In this reply brief we will respond to the arguments contained in the first three points of the Secretary's brief. We do not believe the fourth point requires reply.*

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* In their Point IV, the Secretary's attorneys urge that this Court examine on its own the additional claims of violation raised in their motion for summary judgment which were not passed upon below. In light of their failure to even brief these issues to this Court, we do not believe it fair to either the Court or the appellant to suggest that the Court determine these serious issues on the basis of its own culling of the voluminous record below. In any event, (taking the contentions enumerated at p.47 of the Secretary's brief) contentions 2 and 4 relate only to Offshore Division and not International officers; contention 3 borders on the frivolous and cannot under summary judgment standards satisfy the "may have affected" requirement; and contention 1 falls a fortorari if the determination on the Newsletter which underlies the decision below is reversed.

As we noted in our opening brief, the principal practical issue, and the one which impelled the Union to press this appeal, is whether the IOMM&P should be compelled to undergo yet another expensive, wrenching election in 1976 (after a regular election in 1974 and a run-off for principal officers in 1975) or whether, consistent with the statutory purposes, the election can and should be deferred until 1977 when the present terms of office expire. Although the Union maintains that no supervised election is necessary or warranted by law, its principal concern is not with the fact of government supervision but with the question of timing.

REPLYING TO APPELLEE'S POINT I

A.

The Secretary's brief in effect concedes that the material in the Newsletter was confined to the affiliation issue and to the stands of O'Callaghan and Sheldon on that issue. Moreover, no claim is or could be made that the timing of the referendum was manipulated for election purposes or that the Union, if it was to get its views across at all, could have done so at any time other than when it did. Because, however, both Presidential candidates took strong positions on the affiliation issue, the Secretary argues that the Union was disabled from distributing literature which discussed these positions and commented upon the motives of those opposing the referendum proposition.

The Secretary's position lacks merit both in the abstract, and, more particularly, in its application to the facts of this case. What the Secretary in effect contends is that when an independent issue arises at the same time as an election, then irrespective of the importance of that issue to the future and survival of the organization, the union through its elected leadership is powerless to communicate with the membership on the substance,nature and motivation of the opposition if one of the election candidates has taken a public position on the issue. And if the union officials lack the independent financial means to finance the distribution of pro-referendum views, then the membership will never know why the anti-referendum propaganda is both scurrilous and false or the reasons for its propagation.

The Secretary's failure to perceive the factual context of the 1971 Newsletter also bears directly on his erroneous contention that there were no facts to be developed at trial and that the Newsletter should be evaluated on its face. What the Secretary overlooks is that this Newsletter was not an unprovoked attack upon Sheldon or anyone else, it was a response to literature and charges previously disseminated on a wide scale by affiliation opponents, including Sheldon. Nor is this a case in which the union officials had ample funds to draw upon, while the opposition was penniless. Here the opponents had ample outside financing through the rival union which

sought to defeat ILA affiliation; the elected union leadership had none. A trial would have developed not only the nature and scope of the opposition effort, but the sources of its support and the motive of its sponsors. These were all legitimate subjects of union reply; and the fact that the language used was "robust" does not detract from the reasonableness and justification of the union's action.

The cases cited in the Secretary's brief (p. 23) are not in point. Both Wirtz v. Independent Workers Union of Florida, 272 F. Supp. 31 (M.D. Fla. 1967) and Hodgson v. Liquor Salesmen's Union, Local No. 2, 334 F. Supp. 1369 (S.D.N.Y. 1971), affd 444 F. 2d 1344, involved direct election propaganda. In each case the incumbent's self-praise and attack upon his opponent related to the forthcoming election and the incumbent's superiority as an elected candidate. In neither case was the challenged reference exclusively directed at another pending issue.

B.

On the claim of collateral estoppel, the Secretary erroneously contends that the union "waived" its right to appeal from Judge Croake's 1971 order by voluntarily dismissing the appeal after the election was over. The completion of the election, however, mooted the appeal in that pre-election proceeding and the appeal was, therefore, properly dismissed. Golden v. Zwicker, 394 U.S. 103 (1969); DeFunis v. Odegaard, 416 U.S. 312 (1974); United States v. W.T. Grant Co., 345 U.S. 629 (1953). Once the election had ended, the issues could only be litigated in

a post-election suit by the Secretary. In acknowledging the pre-election case to be moot, the union "waived" nothing. To the contrary the Secretary's position in this action would deprive the Union of the right to effective appellate review at any point.

REPLYING TO APPELLEE'S POINT II

In dealing with the question of whether a supervised election should be held and if so, when, the Secretary's brief treats the issue in general terms without any particular attention to the facts of this case. We readily acknowledged in our main brief that notwithstanding an intervening election, if the statutory purpose of protecting the democratic election process and preventing the improper perpetuation in office of incumbents requires a supervised election, then one should be held. We also acknowledged that in the usual case, these statutory purposes will not be satisfied by an intervening election. We urged, however, that under the particular facts herein a supervised election is not required; and that in any event the results of the 1974 election remove any urgency from the situation and, indeed, render the decision below arbitrary, capricious and an abuse of discretion in its insistence upon thrusting the IOMM&P into a very costly and divisive election at this time.

The Secretary argues that our position is dependent upon a formal determination of the validity of the 1974 election

and that this would enable a labor organization to thwart effective relief indefinitely (Sec'y Brief, p. 30). This contention is wholly without merit. It requires no further proceeding to recognize that the incumbent President, who was allegedly benefited by the 1971 Newsletter, lost in 1974-1975 and no longer holds union office and that incumbents in other principal offices were also defeated. It is likewise known that the alleged 1971 taint relied on below related to but a single piece of literature and not to any Constitutional infirmity or corruption in the election process. Also undisputed is the fact that in 1973 many candidates stood for election for the various union posts, and no one was apparently deterred by the 1971 events. And finally, the costs of a new election are well documented and subject to ready check.

Equally without foundation is appellee's rather flip comment that the costs of a 1976 election should not be considered, for otherwise a union might establish "elaborate election procedures" to delay a supervised election. A mere reading of the IOMM&P Constitution (J.A. 1291) which contains the election requirements and procedures, will convincingly demonstrate that these "elaborate" procedures are designed to assure democracy, to increase both membership participation and outside supervision, and thus to foster membership confidence in the integrity of union referendum and election processes.

Indeed, it has been judiciailly held that the cost of a

new election may be considered by a Court in a proceeding to set aside,as arbitrary and capricious, the Secretary's determination of the date of a supervised election. Brennan v. Local 551, UAW, 486 F. 2d 6 (7th Cir. 1973). And Courts have not hesitated to defer the holding of supervised elections in the interests of justice and equity. Wirtz v. Local 169, Hod Carriers, 246 F. Supp. 741 (D. Nev. 1965); Wirtz v. Independent Workers Union of Florida, 272 F. Supp. 31 (M.D. Fla. 1967); Note, The Election Labyrinth: An Inquiry into Title IV of the LMRDA, 43 N.Y.U.L. Rev. 336, 375-380 (1968). Moreover, any practitioner representing labor organizations knows that the Secretary frequently settles union election cases by agreement empowering him to supervise the next regular election, even though that may be many months in the future.

The cases cited in appellee's brief do not support his position. Those that follow Glass Bottle Blowers, 389 U.S. 463 (1968) all involve fact situations in which incumbents prevailed in subsequent elections or for other clearly discernible reason the public interest in the integrity of the election process required a supervised election. The only case in which the incumbent was subsequently defeated is Brennan v. Steelworkers, Local 3489, 520 F. 2d 516 (7th Cir. 1975). In that case, however, the taint lay in a by-law provision which rendered more than 96% of the local's membership ineligible to run for union office. From the Court's opinion it would seem that this by-law provi-

sion remained in effect during the subsequent election. Obviously, a new election in which 96% of the membership was barred from seeking office could hardly be deemed corrective of the original taint. The facts at bar are totally different.

Although the Secretary's brief notes the uncertainty created by Judge Knapp's decision on the invalidity of the ratification referendum on the IOMM&P's 1970 Constitution, it contents itself with repeating, without elaboration, Judge Motley's own unexplained conclusion that the possibility of a new election being required because of defeat of the 1970 Constitution is "too tenuous". Given the extremely close vote on this same issue in 1970, no reason suggests itself as to why this should be deemed only a "tenuous" possibility and the Secretary's brief suggests none either. We do note, however, that appellee's brief errs in stating, at p. 17 that it is only the Union which suggests that the Constitution "could" be discarded in 1977 and that an election would then have been compelled unnecessarily. Judge Motley's own opinion so states in footnote 2.

Finally, appellee's brief misleadingly states that the choice is between an election ending in 1976 and one ending in 1978. In fact the election ordered below can commence no earlier than June 1976 while the regular 1977 election will commence in June 1977. The time involved is one year, no more.

REPLYING TO APPELLEE'S POINT III

The Secretary's brief cites no judicial decision approving the administrative invalidation of union Constitutional provisions in the course of supervising an election. In Brennan v. Local 639, IBT, 494 F. 2d 1092 (D.C. Cir. 1974), the District Court, not the Secretary, invalidated the challenged by-law provision. Unlike the instant case, the challenge to the by-law was fully litigated in the summary judgment motion, and the Court's order was issued virtually simultaneously with its summary judgment. Moreover, the by-law had initially been invalidiated by the International union itself which then sought to reinstitute a modified version for purposes of the pending election only. Characterizing this as an effort to "retroactively adopt and apply" a new election requirement, the Court held that the proposed new provision could not properly be considered part of the union's Constitution to govern the supervised election. Nothing of the sort appears in the case at bar.

Appellee suggests that if the propriety of leaving issues of Constitutional validity to the Secretary's supervisory determination is in doubt, then this Court should now decide the merits of the question. Although we do not believe we should be required to develop an argument on so serious an issue in a reply brief on an expedited appeal, we shall set forth our position in the event the Court adopts appellee's position.

The Secretary advances no authority in support of his contention that the Constitution of a subordinate labor organization cannot provide that designated International officers shall also serve in corresponding offices within the subordinate body. No case, to our knowledge, so holds, and appellee cites no legislative history in support of his theory. Our own examination of the legislative history discloses nothing indicative of a Congressional intent to bar this type of Constitutional provision.

Titles I and IV of the LMRDA are clear in their commands and proscriptions. All members must have the right to nominate, run for office and support candidates, subject to reasonable regulation. There must be a secret ballot election and the rules as to campaign procedures must be observed. Concededly, the IOMM&P Constitution meets all these standards and requirements.

The Secretary is thus reduced to arguing (Br. p. 39) that the LMRDA embodies "democratic principles as known in the United States" and that the IOMM&P Constitutional structure violates these principles. But as we have shown in our principal brief (pp. 34-36) the LMRDA does not mandate one man-one vote, American Federation of Musicians v. Wittstein, 379 U.S 171 (1964), nor does it require that every member be empowered to vote for every officer.

The test, in our view, is whether the Constitutional structure is reasonable. It is embodied in the Offshore Division Constitution which was adopted by the membership of the Offshore Division itself and no one else. It was part of an effort to centralize responsibility. And it has important fiscal consequences, for the International officers receive no additional compensation for their services to the Offshore Division. If Offshore Division officers must all be separately elected, and members may thus be elected to Offshore Division office alone, how are they to be compensated for their work? Nothing in the LMRDA prohibits the members of a subordinate labor organization division from maintaining modestpayroll by providing that officers elected by themselves and fellow members of the same International shall serve as officers of the subordinate body.

CONCLUSION

For all the foregoing reasons and for those set forth in our principal brief, we respectfully urge that the Judgment and Order below be vacated and the case either dismissed or

remanded for trial. Alternatively, we urge that the Judgment be amended to provide for supervision of the next regular election commencing June 1977.

DATED: June 15, 1976
New York, New Yor

Respectfully submitted,

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Service of 3 copies of this within Brief is admitted this 15 day of June 1976.

ATTORNEY FOR

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COPY RECEIVED
June 16th 1976
UNITED STATES ATTORNEY